1889

KRISTO GOBIND MOJUMDAR v. HEM CHUNDER CHOWDHRY.

The judgment of the Court (PRINSEP and WILSON, JJ. was) as follows:—

Decrees for arrears of rent were obtained against Brojosundari, a Hindu widow, which are now put into execution after her death against properties forming her father's estate in which she had only a life interest. The question raised on these appeals is, whether they are decrees merely against her personally, and, therefore, to be satisfied out of whatever she left at her death, or whether the estate which has passed to the next heirs, is liable.

We are of opinion that the principle laid down by their Lordships of the Privy Council in the case of *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (1) should be adopted, and that the debt cannot be regarded as other than a personal debt, payment of which can be enforced only against the property left by the widow. The case decided by the Full Bench of this Court—*Hurry Mohun Rai* v. *Gonesh Chunder Doss* (2)—is not in point, as the debt of the Hindu widow was contracted under different circumstances, such as were held by the majority of the Judges to bind the ancestral estate. We accordingly set aside the order of the lower Courts with costs.

Appeals allowed.

J. V. W.

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ABHAYESSARI DEBI (PETITIONER) *v.* SHIDHESSARI DEBI (OPPOSITE PARTY).*

1889 *March* 13.

Criminal Procedure Code Act X of 1882, s. 145—*Dispute as to right to collect rents—Tangible immoveable property.*

A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code, and the operation of that section cannot be limited by any rule which would depend upon the area of the property in dispute.

* Criminal Motion No. 19 of 1889, against the order passed by G. Godfrey, Esq., Deputy Commissioner of Goalpara, dated the 29th of December 1888.

(1) L. R., 2 I. A., 275; I. L. R., 1 Calc., 133.
(2) I. L. R., 10 Calc., 823.

1889

ABHAYESSARI DEBI v. SHIDHESSARI DEBI.

Where, in such a dispute, which related to two pergunnahs comprising more than three hundred distinct villages, it was admitted by the petitioner that the opposite party had been in possession by receipt of rent from the tenants up to a period some three months anterior to the institution of the proceeding, but she alleged that she had succeeded in inducing the tenants to attorn to her by payment of rent to the officers appointed by her since such period; and where the Deputy Commissioner, after recording a certain amount of evidence, refused to examine any more witnesses, on the ground that the enquiry would extend to an inordinate length and be extremely expensive, and passed an order under the section—

Held, that even though it might be established that the Deputy Commissioner's action in excluding evidence was illegal, it did not follow, having regard to the circumstances of the case, that the High Court would be justified in exercising its revisional powers.

Held, further, that a payment of rent for a short time to the petitioner, even if proved, would not amount to dispossession of the opposite party. *Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (1) followed.

THIS application arose out of a proceeding under s. 145 of the Criminal Procedure Code, instituted in the Court of the Deputy Commissioner of Goalpara, between the two Ranis of the late Raja of Bijni, the property in dispute consisting of two pergunnahs, Habraghât and Khotaghât, in which there were several hundred villages with a population of over 100,000 persons, and of which the assessment at one time appeared to have been about two lakhs of rupees. The pergunnahs formed a substantial portion of the Bijni Estate, and each of the Ranis claimed to be entitled to succeed thereto and to possession thereof to the exclusion of the other. The late Raja died on the 9th March 1883, and these proceedings were instituted on the 23rd May 1887.

Considerable delay took place owing to various applications being from time to time made to the High Court, and owing to a Receiver of the whole estate having been appointed by the Court of first instance in a civil suit filed by the second party. Ultimately an appeal was preferred to the High Court against the order appointing a Receiver, and, as the hearing of that appeal was delayed and numerous police reports as to the likelihood of a breach of the peace occurring were made, the Deputy Commissioner ordered these proceedings under s. 145 to be continued. Ultimately after other applications to the High Court, the Deputy

(1) I. L. R., 15 Calc., 527.

1889

ABHAYESSARI DEBI v. SHIDHESSARI DEBI.

Commissioner on the 29th of December 1888 passed an order declaring Rani Shidhessari Debi to be in possession of the two pergunnahs and entitled to retain such possession until ousted by due course of law, and forbidding any disturbance of her possession, and ordering the second party to pay the costs. The main facts of the case and the various proceedings had in the matter are sufficiently stated in the judgment of the High Court. The material portion of the judgment of the Deputy Commissioner, delivered when the order was passed, was as follows:—

"The case was instituted on the 23rd May 1887, and proceedings have been delayed on account of references to the High Court, on account of a Receiver having been appointed by the Judge, and the inability of the Magistrate to go on with the case pending final orders regarding that appointment. The delay in a case, which by its very nature requires a prompt order, is very extraordinary and very anomalous.

"I am asked by the first party, Rani Shidhessari, or the elder Rani, to find that she was in exclusive possession of the pergunnahs on the date of institution of these proceedings, and I am asked by the second party, Rani Abhayessari, or the younger Rani, to find that she was in exclusive possession of the estate with the exception of a very few villages, in which possession was divided and of a few villages in which the first party's possession is admitted. Possession I take to be in the main the enjoyment in whole or in part of the profits arising from the soil, notably the rents paid by cultivators. Evidence of receipt of rents has been adduced by both parties, and there is no doubt that, when these proceedings were instituted, many of the ryots paid rent to the first party, and many paid rent to the second party, and many of course paid no rents at all to any one.

"I have nothing to do with the means by which possession was obtained by the second party, or whether that possession was wrongful or not, so long as it was a peaceable possession.—*Ambler* v. *Pushong* (1) and *Bunwari Lall Misser* v. *Raja Radha Pershad Singh* (2).

Both parties have adduced the evidence of witnesses as to the payment of rents and both have filed masses of counterfoil cheque

(1) I. L. R., 11 Calc., 365. (2) 1 C. L. R., 136.

1889

ABHAYESSARI DEBI v. SHIDHESSARI DEBI.

receipts, *amdanis*, and other papers in support of their respective contentions, and I have no reason for discrediting the papers that have been filed. Supposing the dispossession of the first party to have been followed by peaceable possession on part of the second party, that is, supposing the first party could be regarded as having been dispossessed at all—it would be necessary to ascertain the fact of possession in all the holdings and mouzahs comprised in the two pergunnahs. Such an inquiry would be impracticable and hopeless.

"Assuming then, for the sake of argument, that dispossession in part followed by peaceable possession has taken place, I should have to look to the question of title in order to guide me to a decision, because it is quite impossible to ascertain who was *de facto* in possession of each mouzah and holding in the estate, or else I should have to attach the whole estate under s. 146.

"I will refer to the question of title later on, suffice it to say, that I cannot find the second party to have any title to possession, still less to exclusive possssion. It is true that the first party cannot apparently recover rents from the cultivators that fell due after 1st July 1886, when the Assam Land and Revenue Regulation came into force, because she is not registered under that Regulation but only under Regulation VIII of 1800.—*Brojo Nath Chowdhry* v. *Birmoni Singh Monipuri* (1). Still she is able to sue for rents that were due on the 30th June 1886, and so she had the legal right to recover rents for two years when these proceedings commenced. The second party had no such right at all. So far, therefore, as this right to recover rents is an index of title and of possession, it certainly lies with the first party and not with the second party. The fact of non-registration under Regulation I of 1886 is not, I think, tantamount to an absence of possession, which is clearly something more than the legal right to recover rents due from cultivators. I have shown that such a right does vest, to some extent, in the first party, and I do not think that I should be justified in the circumstances to proceed to attachment of the two pergunnahs.

"It is admitted that, when this case was instituted, the first party was the sole registered proprietor; that all suits for or against

(1) I. L. R., 15 Calc., 527.

the Bijni estate were carried on in her name ; that she paid the Government revenue on the estate and the local rates ; that, prior to February 1887, all the business of the estate was managed by her alone, she appointed and dismissed the officers of the estate, issued parwanas in her own name and bearing her own seal, and that the name of the second party did not enter into any of these proceedings, and that she alone was in receipt of rent from the ryots ; also, that when these proceedings commenced she was in possession of the Rajbari, of all the moveable property left by the deceased Raja, and of all the old tahsil cutcherries of the estate. The second party set up her right to exclusive possession in February 1887, and without doubt many of the ryots went over to her and paid her rents and presented her with *nuzzurs ;* but these ryots had up to that time been paying rent to the first party and the first party has never acquiesced in the change. All kinds of disturbances arose in consequence of the subversion, as far as it went, of the existing order of things ; so that such possession, as the second party obtained, cannot be called a peaceable possesion.

"On behalf of the second party the contention is raised that she and the first party were joint proprietors ; that they were actually joined as one party in the case under s. 145, Criminal Procedure Code, of *Empress* v. *Chandra Narayan Subhá* (first party) and *Rani Sidhessari Debi* and *Rani Abhayessari Debi* (second party) ; that therefore the second party had a joint interest in all the lawsuits in which the Estate was concerned ; that all collections of rent were made on her behalf jointly with the first party ; that in fact the first party was acting merely as manager or head of the family, and that she cannot be presumed to have been acting in her own sole interest or to have a sole interest in the estate ; and that, therefore, the possession of the second party was a lawful and proper possession, and it is immaterial whether the first party acquiesced in it or not.

"On the other hand, there are the facts already referred to in support of the position that the first party was the sole proprietor ; and it may be stated that the first party has always admitted the second party's interest in the estate to the extent of a right to maintenance out of the funds of the estate, but she has never

1889

ABHAYESSARI DEBI v. SHIDHESSARI DEBI.

admitted the position that the second party is a co-sharer. The point was not raised, and was not in issue in the case of *Chandra Narayan Subha* above referred to, and so it cannot be taken to be *res judicata*. The two Ranis were at that time living amicably together, and so far as the younger Rani's claim to maintenance went of course she had an interest in the estate. It is quite probable that the elder Rani and her advisers never supposed that the fact of the two names being joined as one party would ever give rise to a claim of co-ownership. Of course there is the well-known presumption of Hindu law that the status of a Hindu family must be presumed to be joint till the contrary is proved, but in this case the family is that of a Raja. The registration of name was effected by the Rani Sidhessari as Pat Rani. She alone has been recognised by Government as the proprietor of the estate. She has for years appeared before the public in that capacity and Rani Abhayessari has, so to speak, been a mere outsider. In view of all these circumstances, I am unable to presume that the interest of the second party in the Bijni estate was that of a co-owner, and I cannot find that she had any right to possession as against the first party. To sum up, the possession of the first party has been disturbed by the second party, but that disturbance of possession has not heen acquiesced in by the first party, and I am not bound to recognise the sort of dispossession that has taken place. But even if the second party has acquired partial possession, as indicated by the enjoyment of rents paid by cultivators, I cannot find that the second party has any title. I find that so far as rents are concerned, the first party was in possession exclusively up to February 1887; that she alone was in possession on the date of the institution of these proceedings so far as the right to recover rent at all may be disputed between the parties, that is, she alone could recover the rents that fell due before the 1st July 1886. I also find that so far as recognition by Government and the payment of Government dues, the possession of the Rajbari and of all the old tahsil cutcherries are an index of possession, the first party was in possession when these proceedings commenced.

"Lastly, I may say, that the fact of ryots of the first party going over to the second party, without the consent and against the will

of the first party, does not constitute an adverse possession, that as the first party never acquiesced in this attornment of her ryots her possession never in fact ceased.—(*Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri*. (1.)"

Rani Abhayessari Debi, the second party, being dissatisfied with that order, accordingly applied to the High Court, under s. 439 of the Criminal Procedure Code, to send for the record and to set aside the order upon numerous grounds the nature of which appear sufficiently for the purpose of this report in the judgment of the High Court.

Upon this application a rule was issued which now came on for hearing.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *M. M. Ghose*, Mr. *A. M. Bose*, Baboo *Durga Mohun Dass*, Baboo *Ambika Charan Bose*, Baboo *Boikanta Nath Dass*, and Baboo *Chandra Kanto Sen*, for the petitioner.

The *Advocate-General* (*Sir G. C. Paul*) Mr. *H. Bell*, Baboo *Iswar Chunder Chuckerbutty*, and Baboo *Kretanto Kumar Bose* for the opposite party.

The nature of the arguments advanced at the hearing of the rule appear sufficiently for the purpose of this appeal from the judgment of the High Court (MITTER and MACPHERSON, JJ.) which was as follows:—

This rule arises out of a proceeding under s. 145 of the Criminal Procedure Code instituted in the Deputy Commissioner's Court of Goalpara, between the two Ranis of the late Koomood Narain Bhoop, Raja of Bijni.

It appears that the aforesaid Raja died on the 9th March 1883, when the second party, junior Rani, was about 19 years of age. The elder Rani, the first party, was allowed by the authorities to assume management of the estate left by the Raja, which consisted of two very extensive pergunnahs, *viz.*, Habraghât and Khotaghât, comprising over 300 villages. It is admitted that the first party remained in sole possession of the said two pergunnahs from the death of the Raja to the month of February 1887 by receipt of rent from the tenants of the said pergunnahs.

(1) I. L. R., 15 Calc., 527.

1889

ABHAYESSARI DEBI v. SHIDHESSARI DEBI.

The second party lived in the *Rajbari* with the first party till August 1886. About that time there having arisen a serious difference between the two Ranis, the second party left the Rajbari.

It is alleged by the second party that the first party, for certain reasons to which it is not material in these proceedings to refer in detail, has no title to the Raj, which, by the law of inheritance, vested in her alone upon the death of the late Raja.

It is further alleged by the second party that she, being alone entitled to the whole Raj, took measures from the month of February 1887 to assume exclusive possession of the aforesaid two pergunnahs.

On the second party attempting to take possession of the two pergunnahs, the first party made an application to the Deputy Commissioner of Goalpara, to institute proceedings under s. 145 of the Criminal Procedure Code, alleging that there was a likelihood of a serious breach of the peace in consequence of the endeavours of the *amlas* of the junior Rani to collect rents forcibly from the tenants. The statement regarding probability of the breach of peace was confirmed by many police reports. Thereupon the Deputy Commissioner instituted the present proceeding on the 23rd of May 1887.

The second party moved this Court on the 28th May 1887 to set aside the order of the 23rd May, on the ground that there was no valid reason stated in it for initiating proceedings under s. 145 of the Criminal Procedure Code. A rule was issued by this Court upon that application, but it was discharged on the 28th June 1887 on the ground that, upon the materials then before the Court, there was nothing to show that the Magistrate had no authority to take proceedings under s. 145 of the Criminal Procedure Code.

On the 19th July 1887 the parties filed their written statements. The second party in her written statement, amongst other things, alleged that she had instituted a civil suit regarding the Raj, and that on her application, dated the 15th July a rule had been issued upon the first party to show cause why a Receiver should not be appointed to collect the rents and otherwise manage the estate left by the late Raja. She further

stated that she was in exclusive possession of almost the whole of the Pergunnahs Habraghât and Khotaghât, the tenants having of their own accord and without any coercion paid rent to the *amlas* appointed by her.

It appears that the rule regarding the appointment of a Receiver was disposed of by the lower Court by an order appointing a Receiver as prayed for by the second party. Against that order an appeal was preferred to this Court. The Deputy Commissioner being of opinion that the appointment of a Receiver would do away with the necessity of the continuance of this proceeding, by an order dated 13th of August 1887, suspended all further proceedings in it till the disposal of the appeal against the order appointing a Receiver. But the appeal not having been heard, in consequence of frequent applications for postponements and the parties having in the meantime attempted to collect rents, the Deputy Commissioner on receipt of police reports of the likelihood of a breach of the peace occurring, by an order dated 7th of May 1888, directed that the case under s. 145 of the Criminal Procedure Code, be proceeded with. Against that order the second party made an application to this Court on the 26th May 1888. About that time, the second party also made another application to this Court praying that the proceeding, under s. 145 of the Criminal Procedure Code be wholly set aside, as she had instituted a regular suit for the establishment of her title to the Raj. Both these applications were unsuccessful and this Court directed the Deputy Commissioner to proceed with the trial of the proceeding under s. 145 of the Criminal Procedure Code.

The proceedings being resumed, both parties cited numerous witnesses to prove their respective allegations of possession over more than 300 villages. But the Deputy Commissioner being of opinion that it was the intention of the Legislature that a proceeding like this, instituted for the maintenance of peace, should be speedily terminated, declined to examine more than a limited number of witnesses on each side. He decided on the evidence taken by him in favour of the first party. This rule was issued on the application of the second party to set aside the order of the Deputy Commissioner of Goalpara on various grounds.

1889

ABHAYESSARI DEBI v. SHIDHESSARI DEBI.

The questions argued before us, and which in our opinion are sufficient to dispose of this rule, are as follows :—

1st.—That a single proceeding under s. 145, Criminal Procedure Code, was not intended to be applicable to a case like this in which the question of disputed possession related to more than 300 distinct villages.

2ndly.—That on the date fixed for the filing of written statements, the second party was desirous of adducing evidence to prove that there was no likelihood of a breach of the peace, but such evidence was illegally excluded.

3rdly.—That the lower Court acted illegally in declining to examine more than a limited number of witnesses on the question of possession.

In dealing with these questions it is to be borne in mind that the inquiry, if it had not been limited in the way in which it was limited by the Deputy Commissioner, would have lasted for a very long time, and would have been extremely expensive to both parties. That in all probability the civil suit would have been decided before the termination of this proceeding. That even if it had been decided before the disposal of the civil suit, very little advantage would have been gained thereby, as the decree in the civil suit would have made the decision on the question of possession quite ineffectual.

It seems to us, therefore, that even if it be established that the lower Court's action in excluding evidence was illegal, it would by no means follow that we should be justified in exercising our revisional powers on the ground of illegality.

But apart from this consideration the objections noticed above are not, in our opinion, such as would warrant our interference with the order of the lower Court.

With reference to the first two objections, it is sufficient answer to them, that in more than one application, which was made by the second party to this Court, in order to set aside the proceeding of the lower Court, these objections were not taken, and the last order made by this Court directing the lower Court to proceed with the trial of this case precludes her from raising them now. It has been decided by this Court that a proceeding under s. 145 is not limited to disputed possession

1889

ABHAYESSARI DEBI v. SHIDHESSARI DEBI.

between parties in immediate occupation of a tangible immoveable property, but is intended to apply where the disputed possession consists of receipt of rent from tenants in actual possession. That being so, we cannot limit its operation by any rule which would depend upon the area of the property in dispute.

It remains now to notice the third objection. It seems to us that, having regard to the admission made by the second party, that the first party was in possession of the two disputed pergunnahs till the month of February 1887, by receipt of rent from the tenants, it would not have affected the decision of the case at all, if it had been established that the second party, as alleged by her, had succeeded in inducing the tenants of almost the whole of the pergunnahs Habraghât and Khotaghât "to attorn to her by payment of rent to the officers appointed by her between the month of February 1887 and the following month of May, when the present proceeding was instituted." Such payment of rent for a *short* time would not amount to dispossession of the first party.

In this view we are supported by *Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (1).

We are, therefore, of opinion that this rule must be discharged, and it is accordingly discharged.

H. T. H. *Rule discharged.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.

GOPAL CHUNDER SREEMANY (PLAINTIFF) *v.* HEREMBO CHUNDER HOLDAR AND OTHERS (DEFENDANTS).*

1889 *March* 18.

Mortgage—Priority of mortgage—Intention of preserving a prior security presumed—Mortgagee—Mortgagor.

On the 29th November 1882, *H* mortgaged to the plaintiff his one-third share in a house and garden to secure Rs. 1,000 with interest at 12 per cent.

On the 3rd January 1884, *H* mortgaged his one-third share in the same house to a third person to secure Rs. 1,000 with interest at 18 per cent.

* Original Civil Appeal, No. 29 of 1888, against the decree of Mr. Justice Trevelyan, dated the 21st of August 1888.

(1) I. L. R., 15 Calc., 527.